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No. 95-1499

IN THE

# Supreme Court of the United States

October Term, 1995

**OWENS-CORNING FIBERGLASS CORPORATION,**

*Petitioner*

v.

**CLARENCE DUDLEY AND GEORGIANNA DUDLEY,**

*Respondents.*

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**ON PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, SECOND DISTRICT OF FLORIDA**

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## BRIEF BY AMICUS CURIAE, THE STATE OF FLORIDA, IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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12 pp

## QUESTION PRESENTED

The State of Florida, as amicus curiae, believes the second of the two questions presented can be more accurately stated as follows:

**WHETHER THE EXCESSIVE FINES CLAUSE APPLIES TO A STATE'S STATUTORILY-DERIVED SHARE OF PUNITIVE DAMAGES AWARDED IN LITIGATION BETWEEN PRIVATE PARTIES, WHEN THE ACTION IS NOT BROUGHT IN THE STATE'S BEHALF.**

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### INTEREST OF *AMICUS CURIAE*

The litigation below proceeded between private parties only. It was not brought in the State's name. The State of Florida's interest was inchoate until a jury awarded $8.25 million in punitive damages against Petitioner, Owens-Corning.

By operation of law, Florida is entitled to 35% of punitive damages awarded. § 763.78, Florida Statutes (1995). Petitioner separately challenges this share as an excessive fine. Florida's interest is in upholding the application of §768.73, thereby preserving its share of the award.

## PARTIES INVOLVED

Neither the State of Florida nor any of its agencies was a party to the litigation below. No separate action has been maintained against Petitioner. Otherwise, Petitioner's list of parties is accepted.

Since Petitioner attacks the constitutionality of §768.73, Florida Statutes, the Attorney General of Florida was entitled to notice and service under this Supreme Court Rule 29.4(c). Counsel is not aware that such service was made.

Under Rule 37.5, the parties' consent to this amicus brief is not required.

## SUMMARY OF ARGUMENT

The decision below does not warrant certiorari review under Rule 10.1(b) or (c). With regard to the second question presented (Florida's share of the punitive damages), the Second District Court of Appeal did not decide a federal question in a way conflicting with a decision by another state court of last resort or by this Court. The petition for certiorari does not allege such.

The question reserved by this Court in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 275 n. 21 (1989), is not presented. Florida was not injured in fact; it took no action to obtain the award of punitive damages. The plaintiffs below did not bring a suit in the name of the State to redress harm to the State, and did not share in an award of punitive damages made to the State.

Section 768.73, Florida Statutes, does not establish a cause of action to be brought by a private person on behalf of the State. Rather, it requires final judgments to allocate 35% of punitive damages to the State.

To the extent it attacks Florida's derivative share of punitive damages, the petition for certiorari must be denied. If the overall amount of punitive damages is proper under the U.S. Constitution, Florida's smaller share of that amount must also be constitutional, and cannot logically be "excessive."

## ARGUMENT

### THE PETITION FOR WRIT OF CERTIORARI DOES NOT PRESENT AN IMPORTANT QUESTION OF FEDERAL LAW, AND SHOULD BE DENIED.

The petition for writ of certiorari should be denied. With regard to Florida's share of punitive damages, the Second District Court of Appeal did not decide a federal question in a way conflicting with a decision by another state court of last resort or by this Court. The petition for certiorari does not allege such. To the contrary, Petitioner urges this Court to grant certiorari to answer the question of whether a state's share of punitive damages obtained by private parties can be construed as an "excessive" fine.

The petition should be denied for a second reason. Contrary to Petitioner's contention, the facts of this case do not present the question reserved in *Browning - Ferris, supra*. There, the Court discussed an earlier decision and said:

> We left open the question whether a *qui tam* action, in which a private party brings suit *in the name of the United States* and shares in any award of damages, would implicate the Double Jeopardy Clause. We leave the same question open for purposes of the Eighth Amendment's Excessive Fines Clause. [e.s.]

492 U.S. at 275, n. 21, *citing U.S. v. Halper,* 490 U.S. 435 (1989) [internal citations omitted].[1]

The critical phrase is "in the name of the United States."[2] Obviously, the federal government should not be able to escape the prohibition against excessive fines simply by allowing a private party to sue on its behalf. The same logic would apply to a state-level *qui tam* action and its modern counterpart, the "private attorney general" action. In either instance, a private party would be suing in the State's name, under a cause of action not available to individuals acting in their private capacity only.

In contrast, the litigation below always involved private parties only. The suit was not brought in Florida's name. At no time did the State enter the lawsuit.

Respondents' injuries arose from exposure to asbestos-containing products, including insulation manufactured by Petitioner. Florida was never injured in fact. Thus, the litigation below lacked an essential characteristic of a *qui tam* action—injury to the State or the government. See *U.S. v. Tribal Development Corporation,* 49 F.3d 1208 (7th Cir. 1995):

> So when a legislative body enacts provisions enabling *qui tam* actions, that act carries with it an understanding that in such suits it is the government, and not the individual relator, who has suffered the injury....

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1 In footnote 22 (492 U.S. at 275), the Court also declined to decide whether the Excessive Fines Clause "applied to the several States through the 14th amendment, [and]...whether the Eighth Amendment protects corporations as well as individuals." Based on Florida's argument herein, it is still not necessary to answer these questions.

2 A *qui tam* action is one in which the "plaintiff states he sues as well for the state as for himself." *Black's Law Dictionary* (revised 4th ed., 1968) at 1414.

Id. at 1212. See also, *U.S. v. University of Texas*, 961 F.2d 46, 49 (4th Cir. 1992) ("A *qui tam* relator...has no personal stake in the damages sought—all of which, by definition, were suffered by the government.").

In addition to Florida's lack of injury, there is the language of §768.73 itself. Nothing in that statute even intimates the creation of a cause of action, much less an action brought by private parties to enforce the law on behalf of the State. The award of punitive damages below cannot possibly be construed as the result of State action, or action on behalf of the State. Therefore, no *qui tam* action was prosecuted; and the question reserved in *Browning-Ferris* is not presented to this Court.

Florida's interest did not arise until punitive damages were awarded against Petitioner.[3] Under §768.73(2)(b), Florida Statutes (Pet., p. 120a–122a),[4] Florida is entitled to 35% of punitive damages awarded. However, the jury may not be "instructed or informed" of the State's share. §768.73(8). The State's award is not made until the final judgment, in which the "court shall order the percentages of the awards, payable as provided in subsection (2)." §768.73(3). The obvious inference is that the jury's award of punitive damages is based entirely on the jury's perception of the defendant's conduct, and not on the knowledge that the State will receive a share of the award. The State simply has no "presence" that could influence the award.

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3 Subsections 768.73(2)–(7) were repealed in 1992 by §3 of ch. 92-85, Laws of Fla., effective July 1, 1995. However, the Florida Attorney General recently opined these subsections still operate as to punitive damages awarded before that date. *See* Op. Atty. Gen. 96-15 (Feb. 28, 1996) (the Dept. of Banking and Finance has a duty to collect the state's share of punitive damages awarded by a verdict rendered before July 1, 1995).

4 The petition for certiorari will be cited as (Pet., p.__ ).

Nothing in §768.73 gives Florida standing to enter private litigation for purposes of obtaining punitive damages. The State cannot contest a private party's decision not to seek punitive damages; or a private party's decision to settle, before a verdict is reached, without obtaining punitive damages.

Even when a verdict awards punitive damages and the parties settle afterward, the State cannot contest the amount of the settlement.[5] All the State may do is insist on its "proportionate share" of the settlement amount. §768.73(4).

Consequently, there is no State action involved.[6] Florida has merely conditioned a private party's right to receive punitive damages upon payment of 35% to the State. Here, the plaintiffs below did not share in an award of punitive damages obtained in the State's name. In fact, the reverse is true. The State shared an award obtained by plaintiffs in their own names.

If both the award and amount of punitive damages are proper here, Florida's share could not have been an excessive fine. First, it was not a fine at all. It was but a share of an award, all of which would have gone to Respondents. Next, such share was 35% of the overall amount awarded by the jury. If that amount was constitutionally sound, then Flor-

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5 Once an award of punitive damages has become final, the State may intervene to protect its interest in its share. See *Gordon v. State*, 585 So.2d 1033, 1038 (Fla. 3d DCA 1991), *affirmed with opinion*, 608 So.2d 800 (Fla. 1992), *cert. den.*, 113 S.Ct. 1647 (1993) (trial court did not abuse its discretion by allowing state to intervene, when defendant moved to correct final judgment which mistakenly allocated all of punitive damage award to plaintiff).

6 See *Gordon*, *supra* note 5, 608 So.2d at 803 (observing, that under an earlier version of the statute at issue here, "the State did nothing to earn its sixty-percent share") (Shaw, J., dissenting).

ida's fractional share could not have violated the Eighth Amendment's prohibition against excessive fines.

A defendant's obligation to pay punitive damages arises when the verdict is rendered. At such time, there has been no State action. The State's entitlement to 35% of punitive damages vests later, upon the rendering of a final judgment. That the State later receives a portion of the punitive damage award has no bearing on the amount of the award initially.

In effect, Petitioner's second argument challenges how the total punitive damages award is allocated *after* the obligation to pay has been established. That argument overlooks the remedy. If Petitioner's argument were correct, the final judgment would be changed to allocate the entire punitive damage award to Respondents. Otherwise, Petitioner would escape its obligation to pay full punitive damages simply because one of two recipients was later held ineligible.

Consequently, this case does not warrant certiorari review as to Petitioner's second point. Should a private party sue and be awarded punitive damages in the name of a state, then the question of an excessive fine would arise. Until that time, there is no need for this Court to answer a hypothetical question.

## CONCLUSION

The petition for certiorari must be denied. Alternatively, the petition should be granted only as to first question presented by Petitioner.

Respectfully submitted,

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